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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

TYRELL T. BROWN,

Defendant and Appellant.

C040205

(Super. Ct. No.  
01F05909)

Pursuant to a negotiated agreement, defendant Tyrell T. Brown pleaded no contest to possessing cocaine base for sale (Health & Saf. Code, § 11351.5) and admitted he had served a prior prison term (Pen. Code, § 667.5, subd. (b)). Defendant was sentenced to five years in prison. A certificate of probable cause was granted.

On appeal, defendant contends the superior court lacked jurisdiction to pronounce judgment because no information was ever filed. We agree, and shall reverse.

## PROCEDURAL HISTORY<sup>1</sup>

On July 27, 2001, the district attorney filed a felony complaint charging defendant with possessing cocaine base for sale. Superior Court Judge Robie, sitting as a magistrate, conducted a preliminary hearing on August 20, 2001. However, defendant was screaming during the preliminary hearing, and had to be removed from the courtroom for the rest of the hearing.

At the conclusion of the preliminary hearing, Judge Robie ordered the district attorney to file an information within 15 days. Still acting as a magistrate, Judge Robie then crossed out the preprinted language on the order holding defendant to answer, which states:

"In my capacity as Judge of the Superior Court, I deem the within complaint to be an Information and order it filed in the Superior Court." Judge Robie initialed the deletion and signed the holding order.

On September 4, 2001, Judge Ransom conducted an arraignment in superior court. Although the minute order and the holding order still reflected Judge Robie's order that an information be filed, Judge Ransom simply referred to the case number. The

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<sup>1</sup> Because the facts underlying the actual offense are unnecessary to the disposition, we do not recite them. According to the preliminary hearing transcript, defendant led police on a foot chase. About 25 grams of cocaine base were found in a yard, apparently dropped by defendant.

record of subsequent proceedings held before defendant's plea agreement do not reflect that an information was ever filed.

However, on November 9, 2001, the People apparently filed a motion to "amend[] the information." Appended to the motion is a proposed information. The record contains no ruling on the motion and no arraignment on any information.

#### DISCUSSION

Defendant contends that the court was without jurisdiction to accept his plea or to sentence him to prison. The People concede error if this court determines that no information was filed, but then claim, in a footnote, that there was "no prejudice" to defendant by their failure to file an information. We conclude the failure to file an information deprived the superior court of jurisdiction over defendant.

Penal Code section 949 states, in relevant part:  
"The first pleading on the part of the people in the superior court in a felony case is the indictment, information, or the complaint in any case certified to the superior court under Section 859a."

Penal Code section 739 requires that the People file an information within 15 days of a defendant's being held to answer at a preliminary hearing. The consequences of failing to file the charging document are clear.

In *People v. Smith* (1986) 187 Cal.App.3d 1222, 1223, the appellate court held that timely filing of the valid information gives the superior court jurisdiction to try an accused.  
"Failure to file an information is an irregularity of sufficient

importance to the functioning of the courts that the parties cannot cure the irregularity by their consent to the proceedings. (See *In re Griffin* (1967) 67 Cal.2d 343, 348 [62 Cal.Rptr. 1, 431 P.2d 625].) The superior court did not have jurisdiction to accept appellant's guilty plea or to enter judgment against him." (*Id.* at pp. 1224-1225.)

In *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1132-1133, we upheld a judgment where an information was not actually filed against a challenge based on *People v. Smith, supra*, 187 Cal.App.3d 1222. However, in that case, as in most current cases, the magistrate used her position as a cross-designated judge of the superior court to "deem" the complaint an information and arraigned defendant on the information without objection. (*Cartwright, supra*, at pp. 1132, 1133.) We concluded "Unlike *People v. Smith, supra*, 187 Cal.App.3d 1222, this is not a case where the parties consented in an after-the-fact attempt to cure the failure to file the proper document." (*Id.* at p. 1132.)

We first note that, in response to this court's augmentation order and defendant's multiple requests to complete the record under rule 35(e) of the California Rules of Court, no filed information has been produced by the superior court. The superior court clerk has filed three declarations stating that nothing from the superior court file has been omitted from the record. The People do not argue otherwise.

We conclude the error is jurisdictional. The absence of a charging document is fundamental to due process. Judge Robie's

order to the prosecution to file an information was necessary and proper. Despite defendant's conduct resulting in his removal from the preliminary hearing, the failure of the prosecution to file the charging document in accord with statutory requirements is fatal.

DISPOSITION

The judgment is reversed, and defendant's no contest plea is vacated.

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CALLAHAN, J.

We concur:

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DAVIS, Acting P.J.

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NICHOLSON, J.